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In the Supreme Court of the United States

MAYOR MARC H. MORIAL and
THE CITY OF NEW ORLEANS
Petitioner

VERSUS

SMITH & WESSON CORP., et al.
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, the retroactive application of a statute targeted against a political subdivision of a state, and depriving that political subdivision of vested rights, is an unconstitutional Bill of Attainder under U.S. Const. Art 1 § 10?

Whether, under recent diverse decisions in the Circuit Courts, which hold that political subdivisions of states are not absolutely barred from bringing federal constitutional actions against their various states, considering the expanding and developing principles of local autonomy and home rule powers, should such political subdivisions have actions under the Fourteenth Amendment?

PARTIES TO THE PROCEEDINGS

1) Mayor Marc H. Morial
2) The City of New Orleans
3) Smith & Wesson Corp.
4) Sturm Ruger & Co.
5) Beretta U.S.A.
6) Colt's Manufacturing Co.
7) Glock, Inc.
8) Taurus International Marketing, Inc.
9) SigArms, Inc.
10) Bryco Arms, B.L.
11) Jennings, Inc.
12) Phoenix Arms
13) Davis Industries
14) Navegar, Inc.
15) FMJ, Inc.
16) Arms Technology, Inc.
17) Cash America Pawn of New Orleans
18) Albert's Jewelry & Loan Pawn
19) Professional Sport Shop, Inc.

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Louisiana is reproduced in the appendix at A-3. The Judgment and Reasons for Judgment of the Civil District Court for the Parish of Orleans, State of Louisiana, is reproduced in the appendix at A-2. The original complaint in this matter is reproduced at A-1. The Louisiana Statutes are reproduced at A- 4 and A-5.

JURISDICTIONAL STATEMENT

The Supreme Court of the State of Louisiana rendered its final judgment on April 27, 2001. This Court has jurisdiction pursuant to 28 USC § 10.

STATUTES INVOLVED

This case involves U.S. Const. Article 1 § 10 regarding Bills of Attainder and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioners filed *Morial v. Smith & Wesson, et alia*, No. 98 - 18578, Division "M", in Civil District Court for the Parish of Orleans, on October 30, 1998, reproduced at A-1. Petitioners sought to recover medical costs, pension benefits, investigative expenses and all other damages available under the Louisiana Products Liability Act and existing tort law.

At the time of filing the City of New Orleans had a "right of action" as established by the Louisiana Constitution (1974) and specifically articulated in its Home Rule Charter. The Constitution and 1954 City Charter gives the City the "right" to "sue and defend, plead and be impleaded, in all courts and places . . . in all matters and proceedings. . . ." (Section 1(b) of Act 159 of 1912).

Defendant manufacturers, their trade associations and gun lobby interests announced, immediately after Mayor Morial ["Morial"] and the City of New Orleans ["the City"] filed suit, that they would have the Louisiana Legislature enact laws to defeat the suit, *Morial v. Smith & Wesson.* Representatives of defendants and gun lobby agents solicited the Governor and members of the State Legislature to enact such laws. In response, the Louisiana Legislature enacted Act 291 of 1999 and Act 1299 of 1999 in order to defeat *Morial v. Smith & Wesson* and the other pending litigation. The Governor signed these acts into laws which are now codified at La. R.S. 40:1799 and 9:2800.60, reproduced in appendix at A-4 and A-5. The Legislature enacted these laws for a single purpose: to protect the

special interests of one favored industry.

Colt, Glock, and other defendant manufacturers relying on newly enacted statutes La. R.S. 40:1799 and 9:2800.60 filed peremptory exceptions of no right of action and no cause of action. The Trial Court found La. R.S. 40:1799 and 9:2800.60 unconstitutional for a variety of reasons, Judgment reproduced at A-2.

The Trial Court found that petitioners had a right of action and that their right was not barred by La. R.S. 40:1976. The Trial Court questioned the power of the Legislature to abridge by statute, rights specifically and expressly granted to the City by the Louisiana Constitution as that Constitution (1974) and 1954 City Charter had clearly given the City the "right" to "sue and defend, plead and be impleaded, in all courts and places . . . in all matters and proceedings. . . ." (Section 1(b) of Act 159 of 1912). Act 159 specifically gives the City the right to sue "in all matters and proceedings. . . ." (Emphasis added) The Trial Court found that the Louisiana Constitution does not give the Legislature the authority to abridge these rights, even in the proposed exercise of its police powers.

The Trial Court found that the Legislature cannot abridge rights and powers which the state constitution had established, even those rights and powers the constitution had established for the political subdivisions of the state. In Louisiana only two political subdivisions are "constitutionally-established home rule entities": the City of New Orleans and the City of Baton Rouge. These two home rule entities were not created by the legislature, but were created

directly and expressly by the Constitution of the State of Louisiana (1974). Home rule entities are more than creatures of the legislature, since their powers are granted directly by the constitution. *Francis v. Morial*, 455 So.2d 1168, 1173 (La. 1984) (emphasis added). That same constitution does not give the Legislature the power to prevent constitutionally established home rule entities from bringing suit under the established provisions of tort, contract and other settled bodies of law. Article 3§12 of the Louisiana Constitution specifically prohibits the Legislature from passing laws in order to affect the outcome of pending civil or criminal litigation.

Defendants themselves acknowledged that Act 291 was adopted and made retroactive in order to defeat this pending lawsuit. Ignoring the City's constitutionally established right "to sue", the Louisiana Supreme Court held that the City's right of action was set aside by La. R.S. 40:1799 as being interpretive of La. R.S. 40:1976 (1984), opinion reproduced at A-3. Pertinent to the question petitioners present this Court, the Trial Court found that retroactive application of La. R.S. 40: 1799 would unconstitutionally deprive the City of "Vested Rights" under the Due Process Clause and the Equal Protection Clause of the United States Constitution. The Supreme Court of Louisiana erred in disagreeing with the finding of the Trial Court,. citing older jurisprudence which fails to take into consideration the developing and expanding principles of local autonomy and home rule powers such as articulated in *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir.1979) and *Branson School Dist. Re-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998). These courts clearly reject the principle that political subdivisions of a

state cannot assert federal constitutional claims against their respective states.

The City of New Orleans has broad home rule powers and attendant rights arising from tradition and custom and clearly articulated in the Louisiana Constitution at Art. VI, § 4 and in the City's Home Rule Charter, and which expressly include the right" to "sue and defend, plead and be impleaded, in all courts and places . . . in all matters and proceedings. . . ." (Section 1(b) of Act 159 of 1912). Act 159 specifically gives the City the right to sue "in all matters and proceedings. . . ."(emphasis added). Those rights were reconfirmed and again "vested" by the enactment of the Louisiana Constitution in 1974.

The Louisiana Supreme Court held that the City's expressly articulated constitutional rights were preempted by subsequent enactment of La. R.S. 40: 1796 (1985), eleven years later. That Court's holding raises the issue: Can Legislative enactment take away from public entities, such as the City of New Orleans, rights which have been created by the state constitution or that of the United States prior to such enactment? The answer is clearly "no." The Louisiana Supreme Court's decision also raises the issue: Can the legislature act unilaterally for the benefit of one special interest group without violating the United States Constitution? Underlying the Louisiana Supreme Court's decision are several premises equally false in law and constitutional government.

First, the Court presumed that the Legislature's power was "omnipotent," when in fact, it is "plenary."

Properly received "plenary" means "full, complete or entire" (See: Gardner. *A Dictionary of Modern Legal Usage*, at p. 668); plenary does not mean omnipotent. The power of any legislature is plenary only within its constitutionally circumscribed sphere of function. A legislature has only the power to do what its constitution allows it to do. It can do no more. The long and growing list of legislative enactments that have been soundly and swiftly set aside as unconstitutional by this Court and others demonstrates that the power of the legislature is always limited by the Louisiana Constitution, the United States Constitution and often by jurisprudence. But as the Legislature is not omnipotent, neither is it omniscient.

The Founding Fathers understood that the extensive power of state legislatures would give rise to abuses, some "incompatible with the interests of the Union and others with the principles of good government." To protect the people and other departments of government against such abuses, they insisted "that there ought always to be a constitutional method of giving efficacy to constitutional provisions." THE FEDERALIST No. 80 (Alexander Hamilton)

The United States Constitution implements these principles of limitation on legislative authority through the separation of powers, federalism and individual rights protections. The provisions most relevant here are found in article 1, §10 (Bill of Attainder Clause), and the Fourteenth Amendment (Equal Protection Clause and Due Process Clause) of the Constitution of the United States of America. It is against these state and federal constitutional provisions which La. R.S. 40:1799, 9:2800.60 and 40:1796 must be read.

REASONS FOR GRANTING THE WRIT

While the antique jurisprudence held consistently that political subdivisions could not bring federal constitutional claims against their respective states, recent developments and expanding principles of local autonomy and home rule powers have caused a reversal of this thinking. The Louisiana Supreme Court relied exclusively upon the older line of reasoning in deciding the matter now before this Court.

However, the opinions in *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir.1979), *Branson School Dist. Re-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998), and *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360 (9th Cir. 1998) each demonstrate that the federal circuit courts now agree that political subdivisions are no longer barred from bringing federal constitutional actions against their respective states. The circuits courts are divided as to what actions can be brought and under the provisions of which federal laws and statutes.

The home rule charter guaranteed the City of New Orleans by the 1974 state constitution gives it the broadest autonomy of any city in the country. As such, the City is representative of the trend in government which has expanded the principle and exercise of local autonomy and home rule power.

The Louisiana Constitution and the City Charter give the City the right to "sue and defend, plead and be impleaded, in all courts and places . . . in all matters and proceedings. . . ." (Section 1(b) of Act 159 of 1912). Act 159 specif-

ically gives the City the right to sue "in all matters and proceedings. . . ." (emphasis added)

The Louisiana Supreme Court found that Plaintiffs had no right of action, after the enactment of La. R.S. 40:1799 by Act 291 of 1999, because Act 291 was interpretive of La. R.S. 40:1796 (1985). The Court incorrectly found that Section 1796, which purports to preempt political subdivisions from "enacting" any "ordinance" or "regulation" more restrictive than state law concerning in any way the sale, purchase, possession, ownership, transfer, transportation, license, or registration of firearms, ammunition, or components of firearms or ammunition," denies the City the right to sue for damages caused by the use of firearms.

To support its conclusion, the Supreme Court was willing to wrench the text of Section 1976 and conclude that the Legislature understood the verb "enact" to mean "to bring suit" and understood the nouns "regulation" or "ordinance" to mean "lawsuit". Neither the syntax nor context of the pertinent passage of La. R.S. 40:1796 supports re-definition. Likewise, no authority supports such an extrapolation.

The Oxford English Dictionary defines "enact" as "said of legislative measure" and gives the historical example (1764-65) of Blackstone *Comm. II* 82 "Magna Carta . .enacts that, etc." It gives the additional definition of the verb to mean "of a legislative authority: To make into an act" and gives the historical example (1646) EDW. IV. in *Patson Lett. 493 II* 165 "He shall . . have the said fundacion inacted and auctorised in the parlement next holden." The Dictionary goes on to define the noun "enactment" as: (1)

the action of enacting (a law), (2) that which is enacted; an ordinance of a legislative authority, a statute, or (3) the particular provisions of a law. H.L. Mencken's *American Language* provides nothing to the contrary. Garner, *A Dictionary of Modern Legal Usage*, is equally clear: "enactment" = (1) the action or process of making (a legislative bill) into law <enactment of the bill>; or (2) a statute <a recent enactment>. In no instance, historical, currently received or legal usage, is the verb (enact) or noun form (enactment) used to mean anything other than the legislative act of making a law, or in the noun form, it only means "the law" that has been passed. The Louisiana Supreme Court changed not only the text of the law (La.. R.S. 40:1976), but the English language itself. Section 1976 cannot preempt more than it purports to preempt.

The courts have held consistently that a pre-emptive law, such as Section 1796, can preempt, at most, what it purports to preempt — enactments - - ordinances and regulations. In Louisiana, preemption questions are decided under the same analytic framework as that used by federal courts deciding federal preemption questions. *See Hildebrand v. City of New Orleans*, 549 So.2d 1218, 1227 (La. 1989). The United States Supreme Court has stated, in considering the scope of preemption in an express preemption situation: "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre- empted." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 2618 (1992). Thus, when Section 1796 purports to preempt political subdivisions from enacting "any ordinance or regulation," it is only ordinances and regulations that are preempted. *See Benelli v. City of New*

Orleans, 474 So.2d 1293, 1294 (La. 1985). In *Benelli* the Court held that its appellate jurisdiction under La. Const. art. 5, § 5(D), when "a law or ordinance has been declared unconstitutional," did not give it jurisdiction over a case where an executive order had been found unconstitutional. "The executive order or regulation promulgated by the police superintendent that the court of appeal found to have been declared unconstitutional plainly was not 'a law or ordinance' within the meaning of art. 5, § 5(D)." *Id.*

The City's broad home rule powers include the power to sue, and Section 1796 preempts, at most, only ordinances and regulations.[1] Therefore, the City clearly had a right of action under the Products Liability Act as it existed prior to the adoption of Act 291 of 1999.

It is well-established that legislatures — including the Louisiana Legislature and Congress — must act like legislatures, i.e. they must legislate prospectively, impartially, and with generality, rather than making particularized decisions which only punish or benefit specific individuals. *See, e.g., INS v. Chadha,* 462 U.S. 919, 960-62, 966-67 (1983) (Powell, J., concurring); *Nixon v. Administrator of Gen. Servs.,* 433 U.S. 425, 484-86 (1977) (Stevens, J., concurring); *United States v. Brown,* 381 U.S. 437, 442-47, 454 n. 29 (1965); *Springer v. Government of the Philippine Islands,* 277 U.S. 189, 201-02 (1929); *Hurtado v. California,* 110

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[1] Because of the especially strong home rule powers of the City, Section 1796 might even not preempt City ordinances and regulations.

U.S. 516, 535-36 (1884); *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87, 137-39 (1810); *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 605, 629-32, 656-59, 663, 668-69, 1678 (2d ed. 1988); THE FEDERALIST No. 48 (James Madison); Note, *The Bounds of Legislative Specification*, 72 YALE L.J. 330, 344-47 (1962). This essential principle, which Professor Tribe describes as "governmental regularity," is mandated by several specific Constitutional provisions as well as penumbras emanating from those provisions. Especially relevant federal constitutional rights include: the prohibition of Bills of Attainder, the ban on ex post facto laws, the Contract Clause (all three in Article I, §10 of the U.S. Constitution), the Takings Clause, the Due Process Clause, as well as the general requirements of separation of powers.[2]

Petitioners contend that the Louisiana Legislature violated this basic constitutional principle of governmental regularity by passing retroactive legislation which was designed to benefit only one segment of a single industry to the direct detriment of plaintiffs in this single lawsuit. The Founding Fathers sought to prevent precisely this sort of targeted legislation. It is against just such legislation that petitioners assert these federal constitutional claims.

The Louisiana Supreme Court cited only antique cases supporting the outdated proposition that cities cannot assert federal constitutional claims against their state

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[2]State constitutional provisions banning local or special laws and protecting separation of powers also ensure governmental regularity.

governments. *See, e.g., Hunter v. City of Pittsburgh,* 207 U.S. 161 (1907); *City of Trenton v. State of New Jersey,* 262 U.S. 182 (1923). However, these cases are from an era that preceded strong home rule and full-bodied development of constitutional rights. Today, cities — especially home rule cities — often sue their state governments based upon state and federal constitutional law. For example, *Rogers v. Brockette,* 588 F.2d 1057 (5th Cir. 1979), held that *Hunter, Trenton* and similar cases were actually substantive interpretations of the constitutional provisions involved and should not be considered absolute barriers to suits by municipalities against states. *Rogers* explained that the concept of standing meant something different when those cases were decided. *Id.* at 1070. *Accord United States v. State of Alabama,* 791 F.2d 1450, 1455 (11th Cir. 1986) (following *Rogers* and refusing to apply a *per se* rule against municipal standing to sue). *See also City of Charleston v. Public Serv. Comm'n,* 57 F.3d 385, 390 (4th Cir. 1995); *Branson School Dist. v. Romer,* 161 F.3d 619, 628 (10th Cir. 1998); *Palomar Pomerado Health System v. Belshe,* 180 F.3d 1104, 1109 (9th Cir. 1999) (Hawkins, J., concurring); *Kennecott Corps. v. Salt Lake County,* 702 P.2d 451, 455 (Utah 1985). *See generally* SANDS & LIBONATI, LOCAL GOVERNMENT LAW § 306 (1999).

In the developing and expanding concepts of local autonomy, courts such as those whose opinions are cited above, have afforded local citizens and their political subdivisions federal constitutional rights as groups which were traditionally reserved to individuals. The facts in this matter demonstrate that even Fourteenth Amendment protections are often needed to prevent targeted, special interest legislation.

Closely related to principle of governmental regularity is the federal constitutional ban on Bills of Attainder. *See* U.S. Const. art. I, § 10 ("No state shall . . . pass any Bill of Attainder"). Act 291 constitutes just such an unconstitutional Bill of Attainder.

"The United States Supreme Court has defined such bills as 'legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial.'" *State v. Baxley*, 94-2982 (La. 5/22/95), p.11-12; 656 So.2d 973, 980 (quoting *Brown*, 381 U.S. at 448-49 (1965). *See also Nixon*, 433 U.S. at 468.

The purpose of the Bills of Attainder Clause is to protect individuals or groups from being targeted for a trial-by-legislature. *See South Carolina v. Katzenbach*, 383 U.S. 324 (1966). Furthermore, the Clause is "to ensure that the legislature would not overstep the bounds of its authority and perform the functions of the other departments." *Brown*, 381 U.S. at 44. In particular: "Under our Constitution, Congress possesses full legislative authority, but the task of adjudication must be left to other tribunals." *Id.* at 461. The same is true of the state legislatures. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) ("It is the peculiar province of the legislature, to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments."). Thus, despite the Louisiana Supreme Court's acknowledgment of broad claims for legislative authority, it is clear that any power possessed by the Louisiana Legislature is subject to federal constitutional constraints, including the

constraint that the Legislature act like a legislature, by legislating broadly and generally rather than targeting particular individuals or groups. *See generally* TRIBE, *supra*, at 643-45,655-56 n.18, 622-63, and 1678 n.7.

Here, the Louisiana Legislature violated this basic principle, by adopting the retroactive provision of Act 291, which specifically targets the City of New Orleans for bringing the instant lawsuit. The punishment is severe — the City is forever barred from bringing this or other similar suits against any gun manufacturers. Furthermore, it is clear that Act 291 had exactly this punitive purpose. The retroactive provision of Act 291 violates the federal constitutional prohibition against Bills of Attainder.

Using Act 291 as the ground for dismissing the instant lawsuit would violate even the deferential rational basis test for the Equal Protection Clause of the Fourteenth Amendment. That test requires that the challenged legislative classification must be "rationally related to a legitimate governmental interest." *Department of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973). *See also Johnson v. Robinson*, 415 U.S. 361, 374-75 (1974). Act 291 cannot pass constitutional muster under this test, because there is no legitimate governmental interest or rational basis for the Act, which simply insulates one segment of society from lawsuits, while targeting a single, pending lawsuit for dismissal. *See Moreno*; *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

By forbidding the City to proceed with its pending

lawsuit, Act 291 destroys a right which has vested under state law, and therefore denies the City rights under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

As the Louisiana Fourth Circuit explained in a parallel situation: "The right to file a damage suit in tort is a vested property right. If we were to give retroactive effect to the amending language of [the act there challenged], we would effectively terminate plaintiff's right and in so doing give an unconstitutional interpretation to the statute." *Green v. Liberty Mutual Ins. Co.*, 352 So.2d 366, 369 (La. App. 4th Cir. 1977).

CONCLUSION

On October 30, 1998, Plaintiffs filed this action against certain defendants, including gun manufacturers and their trade associations. Those defendants publically stated their intent to have the Louisiana Legislature enact and the Governor sign laws which would defeat the City's suit and other suits of private party plaintiffs. To accommodate the special interests of the defendants in these pending suits, the Louisiana Legislature passed Act 291 of 1999 and Act 1299 of 1999, and the Governor signed those Acts into laws which are now codified as La. R.S. 40:1799 and 9:2800.60.

The Founding Fathers, understanding that the extensive power of state legislatures could give rise to abuses, such as those witnessed in the enactment of the statutes now before this Court, created safeguards against such legislative usurpations. The United States Constitution incorporated

the principle of separation of powers and provided the means and authority for each branch of government to exercise its own powers, free from intrusion by the other branches.

While the antique jurisprudence held consistently that political subdivisions could not bring federal constitutional claims against their respective states, recent developments and expanding principles of local autonomy and home rule powers have caused a reversal of this thinking. The Louisiana Supreme Court relied exclusively upon the older line of reasoning in deciding the matter now before this Court.

Rogers v. Brockette, 588 F.2d 1057 (5th Cir.1979), *Branson School Dist. Re-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998), and *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360 (9th Cir. 1998) each demonstrate that political subdivisions are no longer barred from bringing federal constitutional actions against their respective states. The circuits courts are divided as to what actions can be brought and under the provisions of which federal laws and statutes. These matters, now before this Court, should be reviewed for the purpose of making that determination.

The Louisiana Supreme Court held that these retroactively enacted laws defeated Petitioners' suit. Petitioners contend that the Louisiana Legislature violated the basic constitutional principle of governmental regularity by passing retroactive legislation which was designed to benefit only one segment of a single industry to the direct

detriment of Plaintiffs in this single lawsuit. The Founding Fathers sought to prevent precisely this sort of targeted legislation. It is against just such legislation that petitioners assert these federal constitutional claims.

The retroactive application of Act 291 violates the Constitution of the United States of America. Almost universally, retroactive application of a law effecting substantive rights would violate an individual's rights of Due Process and Equal Protection under the Fourteenth Amendment, and would be a prohibited Bill of Attainder. Those protections should be understood to encompass group rights as well. In the developing and expanding concepts of local autonomy, courts such as those whose opinions are cited above, have afforded local citizens and their political subdivisions, federal constitutional rights as groups which were traditionally reserved to individuals. The facts in this matter demonstrate that even Fourteenth Amendment protections are often needed to prevent targeted, special interest legislation.

The Legislature, at the express and public request of defendants in this litigation, has provided special protection for them, a small, favored group of tortfeasors, and has protected them from liability for their acts by targeting particular plaintiffs and a small number of pre- existing lawsuits for untimely dismissal.

These retroactive statutes undermine the very foundation of federal and state constitutional government. Political subdivisions need the protections afforded by all provisions of the federal constitution. This Court should

address the division in the opinions of the federal circuit courts and establish which federal constitutional rights can be asserted by political subdivisions against their various states.

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

For the Honorable Marc H. Morial, and
The City of New Orleans

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